IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 354 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

and

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ANANDA NIMBA RAJPOOT

Versus

STATE OF GUJARAT

Appearance:

MS BANNA S DUTTA for Petitioner

MR MA BUKHARI, APP for Respondent No. 1

CORAM : MR.JUSTICE A.K.TRIVEDI

and

MR.JUSTICE J.R.VORA

Date of decision: 11/04/2000

ORAL JUDGEMENT : [Per: Vora, J]

1. The present appellant came to be tried by the learned Sessions Judge, Surat, in Session Case No. 157 of 1989 of charge under Section 302 of the Indian Penal Code. The present appellant came to be convicted by learned Sessions Judge, Surat, for life imprisonment for the charge proved against him vide his judgment dated 6th April, 1990. This appeal is preferred by the accused against the State being aggrieved by the above said judgment of conviction. Brief facts leading to the prosecution and filing of this Appeal are as under :

2. Deceased, in the unfortunate incident, is one Dhanuben, and she was wife of the present appellant. Dhanuben and the appellant were married before 4/5 years to the incident and were residing in Sardar Market, Opp: Dal Mill in hutments at Surat. The present appellant was doing labour work. From this marriage, they had a son aged about 2 years. At the time of incident, the present appellant was earning Rs. 100/- per day. As per the arrangement between husband and wife, they saved Rs. 50/- daily. The incident took place on 27th of June, 1989. On 26th June, 1989, in the afternoon, appellant took Rs. 400/- from their saving amount and returned to home at about 1'O clock at night and told to the deceased that he has lost all the money in gambling and he requires some more amount and demanded that amount from the deceased. The deceased had no money. Therefore, the appellant was irritated and gave beating to the deceased. Thereafter, the deceased slept outside the hut and her infant child was left in the hut. At about 4'O clock in the early morning on 27th June, 1989, when the deceased was in her deep sleep out side the hut, she experienced some burning sensation on her feet. She was awaken and saw that the appellant was present there. He had a bottle of kerosene in his hand. The clothes which were on the body of the deceased were burnt. At that time the deceased shouted that her husband had put her to fire and

that he was escaping. Her body was burnt and she was fallen down on the ground. Persons residing nearby vicinity gathered and wrapped quilt around her, so the fire could be extinguished. Out of these persons, neighbours named Kailash and Damubhai were there. Thereafter in short while, her aunt (sister of mother) Umthaben reached at the residence of the deceased, and in a rickshaw she took the deceased to the hospital where Dr. Laxmanbhai Govindbhai Mewada was on duty and he

treated her. She had 100% burn injuries all over the body of 1st degree and 2nd degree. On an enquiry by Dr. Laxmanbhai Govindbhai Mewada, deceased stated that she was burnt by her husband. At about 5.20 in the early morning on 27th June, 1989, Mahidharpura Police Station received a telephone message from the Maskati Hospital about the incident that one Dhanuben deceased was admitted to the hospital. In pursuance of this message, P.I. Mahidharpura Police Station Bapulal Dhorabhai Patel immediately reached to the Maskati Hospital and contacted Dr. Mewada, and according to him, she was in a position to give replies to the queries and, therefore, PI Mr. Bapulal Dhorabhai Patel recorded a complaint, which is at Exh. 23 as given by the deceased. Below this complaint, deceased put her thump impression and Dr. Mewada also made endorsement that the statement was taken in his presence. Thereafter, the complaint was sent to Mahidharpura Police Station for registration. PI Bapulal Dhorabhai Patel addressed a Yadi to the Executive Magistrate for recording of dying declaration of the deceased. On that Yadi, Dr. Mewada put an endorsement to the effect that "patient is in conscious state at present". The endorsement on the Yadi was put by Dr. Mewada at 7.10 a.m. on 27th of June, 1989. In pursuance to this Yadi (Exh.24), the Executive Magistrate Shri Hitendrabhai Rambhai Patel reached at the Maskati Hospital for recording of the dying declaration of Dhanubhen at 8.05 a.m. and inquired about the patient and inquired about the Doctor on duty who was treating deceased Dhanubhen. According to Hitendrabhai Rambhai Patel, he could find out the doctor and the doctor opined that the deceased was conscious and was in a state to give a statement. According to the Executive Magistrate, Doctor had given this opinion at Exh.24 Yadi and he relied upon that Yadi, recorded the dying declaration of deceased Dhanubhen, which was started at 8.10 a.m. In dying declaration, deceased vide para 6 regarding the incident, stated that she had a quarrel with her husband i.e. appellant at about 3'O clock at night (previous night). She further stated that her husband had lost money in the gambling and, therefore, there was quarrel. The quarrel became grave and her husband poured kerosene on her and put to her fire by a lamp. Thereafter, her husband had run away. Persons residing nearby gathered and they attempted to extinguish the fire by wrapping quilt around her. In the meantime, according to her, she was burnt in whole body and had become unconscious and gained consciousness in the hospital where she knew that her aunt took her to Maskati Hospital and at present she was fully conscious. Thereafter, the PI, Mahidharpura Police Station Mr. Bapulal Dhorabhai Patel, investigated

the offence, drawn a panchnama of scene of offence, recorded the statements of the witnesses concerned, but on that day at 9.25 a.m. deceased Dhanubhen died in the hospital during the treatment. Postmortem was conducted. The accused i.e. present appellant was arrested. He had also burnt injuries on his both hands and ultimately a charge sheet came to be filed against the present appellant in the court of JMFC, Surat. The charge was under Section 302 of the Indian Penal Code, and hence, case was committed to the Court of Sessions at Surat; which was registered as Sessions Case No. 157/89.

3. Prosecution examined six witnesses in all. PW1 (Exh.11)) Dr. Rameshchandra Parbhubhai Gandhi, who has deposed that at 9.25, Dhanuben expired in the hospital. She had 100% burnt injuries. That death was due to extensive 100% burns and consequent blood circulation failure. He also examined the appellant on 28th July, 1989 at 12.15 hours, who had in all three burn injuries on right hand, on small finger of left hand and on abdomen. Those were simple injuries and Doctor issued certificate to that effect. PW2 Hitendrabhai Rameshbhai Patel, the Executive Magistrate, was examined at Exh.14 this witness recorded dying declaration of deceased Dhanuben, which is at Exh.15. PW3 Dr. Rameshchandra Purshotamdas Popat is examined at Exh.16, who had performed the postmortem examination of the deceased and according to him, there were burns superficial as well as deep (extensive) all over the body except right feet and Lumber Region of back. According to Dr. Popat, the death was due to shock as a result of superficial and deep burns. PW 4 Kailashbhai Kisanbhai has been examined at Exh.19. He happens to be a neighbour of deceased. He has deposed that after taking his supper, he slept and on hearing shout, he was awaken. When he reached along with others near the place of the incident, he saw that Dhanuben had got fire and was in flames. He wrapped quilt around her with the help of others present at that time. Thereafter, immediately, he states that the accused was also there and was attempted to extinguish the fire. Dhanuben was taken to the hospital by her aunt and thereafter along with others, he returned to his house. PW5 Dr. Laxmanbhai Govindbhai Mewada is examined at Exh.21 and according to him he was on duty over night till 8.00 a.m. on 27th June, 1989 and at 5.20 a.m. deceased Dhanuben was brought to Maskati Hospital. She was admitted and treated by him. On inquiry, Dhanuben stated that she was burnt by her husband. He made note of this fact in his case papers. According to him, Dhanuben was in proper condition to reply. Her body was wholly burnt. There were 100% burns in all over her

body. According to Doctor, since he knew that a dying declaration was necessary, a sedative was given in less quantity. At 8.00 a.m. his duty was over and at about 9.25 a.m. Dhanuben was dead. Exhibit 24 was shown to him, wherein he deposed that he made a note regarding the condition of the deceased to give a statement and this endorsement is proved by the prosecution. However, the doctor though had carried the case papers with him, but did not produce the same. PW6 Bapulal Dhorabhai Patel is examined at Exh.22. He is the Investigating Officer. He received telephone message from the Maskati Hospital regarding the incident, so he reached at Maskati Hospital and contacted Dr. Mewada PW5, ascertained the condition of the patient and started to record the complaint, which is at Exh.23. After recording of the complaint as stated by deceased, a thumb mark was also taken on the complaint. Complaint was sent to the Police Station for registration, then he addressed the Yadi, which is at Exh.24 to PW2 for recording of dying declaration. Dr. Mewada has made an endorsement as stated above in the Yadi. He further deposes that he investigated the crime and submitted the charge sheet against the accused. On 28th June, 1989, the accused was arrested. Thereafter, he was sent to examination and treatment to the hospital. In documentary evidence, the prosecution produced panchnama of scene of offence, the map of the scene of offence at Exh.12. A certificate issued by Dr. Mewada, Medical Officer, Maskati Hospital in respect to deceased, which is produced at Exh.1. Certificate to the injuries of the accused is produced at Exh.13. Dying declaration as recorded by PW 14 Hitendrabhai Rambhai Patel (Exh.15), postmortem note regarding the deceased is produced at Exh. 17, a Yadi addressed by PW6 Investigating Officer to the Executive Magistrate regarding recording of the dying declaration of the deceased is produced at Exh.24. Mudammal of this case i.e. clothes of the deceased, etc. were sent to the chemical analyser and report from the Chemical Analyser, Surat is at Exh. 27. The complaint as recorded by PW6 of deceased Dhanubhen, is produced at Exh.23.

4. Learned Sessions Judge, Surat, after hearing both the sides, came to the conclusion that prosecution, beyond reasonable doubt, has established that the accused poured kerosene on deceased Dhanuben and put her to fire and was liable to punishment under Section 302 of the Indian Penal Code. Learned Sessions Judge has placed reliance on three dying declarations produced by the prosecution in evidence. More particularly learned Sessions Judge relied upon the oral statement made by deceased before PW5 Dr. Laxmanbhai Govindbhai Mewada

that she was burnt by her husband and, therefore vide his judgment and order dated 6th April, 1990, learned Sessions Judge convicted the appellant and sentenced him for life imprisonment and also fined him for Rs.100/-. Against this order, the present Appeal has been preferred by the appellant in this Court.

5. Learned Advocate Ms. Banna S. Dutta on behalf of the appellant was heard and learned APP Mr. M.A. Bukhari was heard on behalf of the State. Learned Advocate for the appellant assailed the decision of the learned Sessions Judge mainly on the ground that the case is based on dying declaration and on careful scrutiny, dying declarations do not inspire any confidence and learned trial judge erred in relying on those dying declarations. It was urged that the prosecution failed to establish that the deceased was in a fit state of mind to make a statement regarding her cause of death. It was urged that as decided by the Apex Court, mere consciousness of the patient is not enough to rely upon the dying declaration but the Court must satisfy itself about the mental condition of the patient. It was urged that nowhere in the prosecution case, it has been certified by the medical expert that Dhanuben was in fit state of mind to give dying declarations and, therefore, it was urged that the conviction based on this evidence be set aside and the appellant be acquitted.

6. On the other hand, learned APP Mr. M.A. Bukhari has relied on some case laws from this Court and from the Apex Court, which will be discussed at the appropriate place, and has urged that dying declaration (Exh.15) inspires confidence due to the manner and method in which it is recorded. Mr. Bukhari urged that in Exh.15 dying declaration before the Executive Magistrate, the deceased has given logical replies to the queries put to her. Not only that, in last query, she has expressed her concern for her minor child and having referred to the replies given by the deceased to the Executive magistrate vide Exh.15, a presumption can easily be drawn that the deceased was in fit state of mind to make a statement as to the cause of her death. It was also urged that the deceased communicated to the Doctor her cause of death and she specifically stated that she was burnt and put to fire by her husband only. Learned APP Mr. Bukhari urged that PW5 Dr. Mewada is an uninterested and independent witness and there is no reason to disbelieve the deposition and the say of the Doctor to the extent that the deceased communicated to him that she was burnt by her husband. Learned APP Mr. Bukhari urged that this

communication may not be taken as a dying declaration but a simple communication to an independent witness PW5 Doctor and reliance can be placed on him. It was further urged that PW5, to whom Dhanuben stated that she was burnt by her husband, is the Doctor, who had treated her and, therefore he was the best expert person to know the mental condition of the patient. On this premises, learned APP Mr.Bukhari vehemently supported the judgment and order of conviction of learned Sessions Judge, Surat.

7. Having considered the rival contentions and going through entirely the record of the case, it appears that the case of the prosecution rests on three dying declarations of the deceased. There is no other evidence, circumstances as well as direct. There is no eye witness. Out of these three dying declarations, on which the prosecution has put reliance one is an oral dying declaration made by the deceased before Dr. Laxmanbhai Govindbhai Mewada - PW5 (Exh. 21). Another dying declaration is at Exh.15, which was recorded by PW2 Hitendrabhai Rambhai Patel, Executive Magistrate. The third dying declaration is the complaint as recorded by Bapulal Dhorabhai Patel PW6 (Exh.22) PI of Mahidharpura Police Station and the complaint is at Exh.23. The first dying declaration in point of time is alleged to have been made by the deceased at about 5.20 a.m. before Dr. Laxmanbhai Govindbhai Patel - PW5. Complaint (Exh.23) the second dying declaration came to be recorded by PW-6 Bapubhai Dhorabhai Patel, PI Mahidharpura Police Station. Thereafter at 8.10 a.m. PW2 Hitendrabhai Rambhai Patel, Executive Magistrate recorded the third dying declaration of deceased (Exh.15.)

8. There cannot be any doubt regarding the proposition that dying declaration may be the sole evidence if relied upon can form the basis for conviction. Ordinarily, the statement of the witnesses cannot be relied upon unless the witness stands to cross-examination of the opposite party, but under section 32 of the Evidence Act, a statement of the deceased as to the cause of her death is a relevant and admissible evidence and if found reliable, can solely form the basis of conviction. Therefore, a careful scrutiny of dying declaration is required by the courts. In this case, the whole prosecution story depends on the above said three dying declarations of the deceased. Law as settled by the Apex Court in this regard is as under.

9. We shall first discuss the law to deal with the dying declarations, then, shall discuss the facts of the case. In the matter of HEIKRUJAM CHAOBA SINGH vs. STATE

OF MANIPUR, reported in (1999) 8 SCC 458, in para 3, a Bench of the Apex Court observed that an oral dying declaration no doubt can form the basis of conviction, though the courts seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. Thus, the Apex Court has observed that while appreciating the evidence of dying declaration, the court must be satisfied on two aspects. The first is truthfulness of the dying declaration and the second is the mental capacity of the deceased to make a statement. Like wise, in the case of PAPARAMBAKA ROSAMMA & ORS. vs. STATE OF ANDHRA PRADESH, reported in 1999 (6) JT 585, a Bench of the Apex Court in para 9 of the judgment observed as under :

> "It is true that the medical officer Dr. K. Vishnupriya Devi (PW 10) at the end of the dying declaration had certified "patient is conscious while recording the statement". It has come on record that the injured Smt. Venkata Ramana had sustained extensive burn injuries on her person. Dr. P. Koteswara Rao (PW9) who performed the post-mortem stated that injured had sustained 90% burn injuries. In this case as stated earlier, the prosecution case solely rested on the dying declaration. It was, therefore, necessary for the prosecution to prove the dying declaration being genuine, true and free from all doubts and it was recorded when the injured was in a fit state of mind. In our opinion, the certificate appended to the dying declaration at the end by Dr. Smt. K. Vishnupriya Devi (PW 10) did not comply with the requirement inasmuch as she has failed to certify that the injured was in a fit state of mind at the time of recording the dying declaration. The certificate of the said expert at the end only says that "patient is conscious while recording the statement." In view of these material omissions, it would not be safe to accept the dying declaration (Ex. P-14) as true and genuine and was made when the injured was in a fit state of mind. From the judgments of the courts below, it appears that this aspect was not kept in mind and resultantly erred in accepting the said dying declaration (Ex.p-14) as a true, genuine and was made when the injured was in a fit state of mind. In medical science two stages namely conscious and a fit state of mind are

> distinct and are not synonymous. One may be a conscious but not necessarily in a fit state of mind. This distinction was overlooked by the courts below.

10. Thus, by this proposition, the Apex Court has made it clear that in medical science, two stages, namely, consciousness and a fit state of mind are distinct and are not synonymous. One may be conscious but not necessarily in a fit state of mind. What is required to be proved therefore in such cases according to the proposition as laid down by the Apex court is the fit state of mind of the deceased over and above the consciousness and the truthfulness and genuineness of the dying declarations.

11. In the case of STATE OF ORISSA vs. PARASURAM NAIK, reported in AIR 1997 SC 3569, a Bench of the Apex Court in para 6 observed that absence of certificate showing deceased to be medically fit to make statement dying declaration recorded by doctor could not be relied upon and conviction based on that dying declaration was held not proper.

12. Therefore, from the above case laws as propounded by the Apex Court, the clear principle of law which emerges is that the dying declaration alone can be a basis for conviction, may not require even corroboration but before that it must be proved by the prosecution beyond doubt and to the satisfaction of the Court that the patient was not only conscious but was in a fit state of mind to make a statement over and above the truthfulness and genuineness of the dying declaration. Though, under Section 32 of the Evidence Act, dying declarations are admissible evidence, but they are subject to thorough judicial scrutiny while relying upon and while the same is made basis for conviction by the courts. At least, from the evidence of the prosecution a court dealing with the dying declaration as propounded in Heikrujam Chaoba Singh (supra), must satisfy itself about the genuineness, truthfulness and mental state of the deceased, who made the dying declaration.

13. Reverting back to the facts of this case, we shall first deal with the dying declaration as recorded by the Executive Magistrate - PW2 Hitendrabhai Rambhai Patel (Exh.14) and the dying declaration which is in the form of complaint (Exh.23) as recorded by PW-6 Bapulal Dhorabhai Patel, PI, Mahidharpura Police Station. Now, in point of time, Exh. 23 complaint came to be recorded before Exh.15 dying declaration by Executive Magistrate.

In this regard scrutinising the evidence of PW6, he has deposed that when he reached to the Maskati Hospital, he contacted Dr. Mewada and inquired about the health of the deceased i.e. Dhanuben. Then, he deposed that Dhanuben was in position to give reply and, therefore, an inquiry was made from her and complaint (Exh.23) came to be recorded. The right hand thumb impression of Dhanuben was obtained in the complaint and an endorsement was made by the Doctor PW5 Mewada that the statement was taken in his presence. Now, according to the proposition of law as settled down by the Apex Court in the above mentioned cases, this endorsement of the Doctor does not inspire confidence or satisfaction that the patient was in a fit state of mind to make statement. PW6 has inquired about the health of the deceased Dhanuben from the Doctor. Now in his deposition, it is not clear whether Doctor opined that deceased was in a fit state to reply the queries and that whether what is stated by PW6 in his deposition that Dhanuben was in position to reply was his own opinion. If it was the opinion of PW6, it carries no evidentiary value. If it is the opinion of the Doctor Mewada PW5 that Dhanuben was in position to reply, then it is unexplained why Doctor did not put his endorsement to that effect below Exh.23 that she was conscious and was in a fit state of mind to give replies to queries. Instead, Dr. Mewada PW-5 put an endorsement below the complaint that the statement was taken in his presence. Ordinarily, he was required to put an endorsement regarding the consciousness and the mental capacity of the deceased but it is in the darkness that what circumstances prevented the Doctor to make such an endorsement. If the Doctor was of the opinion, as per the say of PW6, if it was not his own opinion, then the endorsement regarding the consciousness and the mental capacity of the deceased was required to be made below complaint - Exh.23. This circumstance creates doubt about the truthfulness of the statement (Exh.23) as well as the mental capacity of the deceased to make such a long statement. Exh.15 dying declaration as recorded by the Executive Magistrate is also required to be considered along with Exh.23 complaint. PW-2 Hitendrabhai Rambhai Patel, Executive Magistrate has deposed vide Exh. 14 that he received Yadi - Exh.24 at 7.30 a.m. In a rickshaw he reached Maskati Hospital at about 8.05 a.m. According to his deposition, he inquired about the patient and inquired about the Doctor who was treating the patient. According to his deposition, he found out the Doctor and he obtained the opinion of the Doctor that the patient was conscious and she was in a fit state of mind to give a statement. Doctor gave a positive opinion regarding this and thereafter he started

to record dying declaration - Exh.15. But, going through the record, in prosecution evidence, nowhere this opinion of the Doctor as stated by PW2 Hitendrabhai Rambhai Patel has been found. In fact, even it is not the case of the prosecution that this witness Executive Magistrate PW2 obtained opinion of the Doctor to the extent that the patient was conscious and that she was in a fit state of mind to give the statement and that when PW2 on oath deposes that the Doctor gave a positive opinion for the consciousness and mental state of mind of the patient, then it was the duty of the prosecution to tender this opinion in evidence. But, as stated above, no such opinion is found in the evidence of prosecution. Thereafter, this witness in his deposition refers to the Yadi (Exh.24). This Yadi is addressed by PW-6 Investigating Officer to PW2 Executive Magistrate. As per the prosecution case on this Yadi at 7.10 a.m.. Doctor endorses his opinion that "the patient is in conscious state at present". Except this endorsement, there is no written medical opinion regarding the mental capacity of the deceased. It is noteworthy that this endorsement was made on Yadi at Exh.24 when it was sent to PW-2 at 7.10 a.m. wherein the Doctor endorses that at 7.10 a.m. the patient was in conscious state. It is also noteworthy that PW2 started to record the dying declaration at 8.10 a.m. i.e. after about an hour the Doctor made an endorsement at Exh.24. Law as propounded by the Apex Court is very clear that the Executive Magistrate should satisfy himself as to the mental capacity of the patient and the consciousness while recording dying declaration. Instead, in this case, surprisingly, PW-2 deposes that he obtained opinion of the Doctor on consciousness as well as on metal condition, which is not found in prosecution evidence. Doctor endorsed at Exh.24 Yadi at 7.10 a.m. regarding only the consciousness of the patient and in this circumstance, PW-2 recorded the dying declaration Exh.15 of deceased Dhanuben and at the end of it, PW 2 Executive Magistrate certified that the patient was conscious at the time of giving replies to the queries put to her by this witness. This Exh.15 for the above mentioned circumstances does not inspire any confidence. Firstly, because there is no satisfactory evidence on the record that the patient was in a fit state of mind while Exh.15 was recorded, and secondly that though it was categorically deposed by PW-2 that he obtained opinion regarding consciousness and the mental capacity of the patient and that opinion is not found in the prosecution evidence. Therefore, as per the law propounded by the Apex Court in the above mentioned cases, this dying declaration - Exh.15 does not stand to judicial scrutiny

nor Exh. 23 - complaint, for the same reasons stand to the judicial scrutiny and fails to inspire any confidence. Not only that, it is the prosecution case that the patient received 100% burn injuries 1st and 2nd degree burns. In postmortem note, Exh. 17, Dr. Rameshchandra Purushottamdas Popat PW-3 (Exh.16) found that there were superficial and deep (extensive burns all over body) except right feet and lumber region of back. The evidence reveals that the skin and the surface of wound was burnt. There were burn injuries all over the body. This necessarily indicates that both the hands of the deceased were completely burnt. Surprisingly, even then right hand thumb mark impression of the deceased was obtained not only on Exh. 23 but on Exh. 15 by PW2 also. These circumstances and contradictions in the evidence of the prosecution remains unexplained. On one hand, it is the prosecution case that there were 100% burn injuries except right feet and lumber region of back and in contradiction on the second hand, the prosecution case is that, both the documents i.e. Exh.23 and Exh.15 contain the right hand thumb impression of the deceased obtained by PW-6, PI and PW-2 Executive Magistrate respectively. On this score also both the dying declaration fails on anvil of probability. For the aforesaid reasons we believe that both the dying declarations suffer from infirmities and inspire no confidence at all.

14. Now, so far as the oral dying declaration of the deceased before PW-5 Dr. Laxmanbhai Govindbhai Mewada is concerned, learned APP Mr. Bukhari vehemently argued that if the statement is considered to be a dying declaration, then also, it is a statement made before the Doctor, who had treated the patience and if it is not considered to be a dying declaration, then also, it is a communication made before the Doctor regarding the cause of death. In natural course, while Doctor inquired about the history, the patient replied that she was burnt by her husband. What was communicated by the deceased to the Doctor is deposed by PW5, who first time treated the deceased and admitted her in the hospital. It was further urged that Doctor is uninterested and independent witness and there is no reason to disbelieve the deposition of the Doctor, to come to a conclusion that the communication by the deceased to PW5 Doctor Mewada was doubtful. Learned APP Mr. Bukhari has attempted to seek support from the decisions of the Apex Court as well as of this Court. He placed reliance in the case of SMT LICHHAMADEVI vs. STATE OF RAJASTHAN, reported in AIR 1988 SC 1785. In that case, Supreme Court observed that the Doctor who treated the deceased had stated that on

questioning the patient she told him that her mother-in-law had burnt her. Such statement could be believed being one made to disinterested person. The fact that Doctor had not recorded the said statement in medical register would be immaterial. Further, the doctor himself had treated the victim. Therefore, there was no question of finding out from the Doctor whether the patient was in a position to give her statement or not. Moreover, the statement before the Doctor was not recorded as a dying declaration. It was a communication by the patient to the Doctor who treated. He was a Government Doctor on duty in the hospital at that time. Nothing had been elicited from his cross examination that he was interested in or enemically disposed towards the accused.

15. Relying on this observation of the Apex Court, learned APP Mr. Bukhari vehemently argued that it was a simple communication before a Doctor who treated her and there is no reason to disbelieve the Doctor who was on duty as a Government Servant. But however on going through the above said decision of the Apex Court, it is clear that the deposition of the Doctor regarding the communication by the deceased to him was corroborated by other witnesses. In para-10 of the above said decision, the Apex Court observed that the statement of Dr. Goel is corroborated by the Ex.P2 recorded by Sop Singh (PW 14). Sop Singh was the first Investigating Officer. Therefore, the Apex Court placed reliance on the deposition of the Doctor because there was other independent evidence to corroborate the communication made by the deceased to the Doctor and to come to the conclusion that the Doctor has inspired the confidence. The fact of this case is other wise. The glaring infirmity which can be noticed in the deposition of the Doctor is that though he had brought the case papers of the treatment to the Court, however, he did not produce the same nor any attempt was made by the prosecution to get those papers produced on record, in which the treatment was recorded along with the symptoms showing condition, at that time, of the patient. It would be a far fetching principles of criminal jurisprudence of this country to cast the duty on the defence to get those papers produced at the instance of defence when the same is not produced by the prosecution. If those papers showing the conditions, symptoms of physical as well as mental capacity of the deceased are not produced, despite the same are brought by the Doctor while deposing and were very well available for the production of the same, then it must lead to an adverse inference regarding the mental capacity of the deceased to make a statement. Not

only that as said above, this deposition of Doctor is not corroborated by any evidence as has been done in the case of Smt. vs. State of Rajasthan (supra). For that reason only, the evidence of Doctor can be discarded. But going a step further when the evidence of PW-5 Dr. Mewada is scrutinised, the above infirmity is glaringly noticed that the prosecution could not get those case papers produced for the satisfaction of the court as evidence. Not only that PW-5 Dr. Mewada does not inspire confidence because it is the case of the prosecution itself that there were 100% burnt injuries to the patient. A certificate is produced by PW-1 Dr. Rameshchandra Parbhubhai Gandhi regarding the deceased. This certificate is signed by PW-5 Dr. Mewada. In the certificate, the Doctor has noted regarding the signs and symptoms to the extent that "100% burns all over body 1st and 2nd degree". No other signs or symptoms were noted by Doctor Mewada in this certificate also. Therefore, it is clear that the patient had received 100% burns all over body 1st and 2nd degree. That denotes that her condition was critical and very serious. Even then, neither case papers were produced nor certificate (Exh.12) contains mental or any other physical symptoms of the deceased nor in deposition PW5 - Dr. Laxmanbhai Govindbhai Mewada deposes anything to the satisfaction of the Court regarding the mental condition of the deceased. Instead, in para 2, he deposes that she was speaking properly. Scrutinising further the evidence of PW-5, it appears that Dr. Laxmanbhai Govindbhai Mewada has either wilfully evaded to give evidence of the mental state of the deceased or somehow has refrained from certifying the mental state of the deceased. In para-4 PW-5 Dr. Mewada has deposed that his duty was over at 8.00 a.m. on that day. Afterwards, he came to know that the deceased expired at 9.25 a.m. Thereafter, he was shown Mark-A document i.e. Exh.24. He admits that he made endorsement on Exh. 24 regarding condition of the deceased to give statement. Dr. Mewada further deposed that at the relevant point of time i.e. while endorsing at Exh.24 as per endorsement, the condition of the deceased was in fit state of mind. Now as stated earlier, if we peruse the endorsement at Exh.24, it clearly indicates about the consciousness of the deceased because endorsement is "patient is conscious state at present". Apparently, this is not the opinion of the expert regarding condition of the patient as to her mental capacity to make a statement. As we have observed earlier, prosecution must prove that the deceased was in fit mental condition to give a statement. But, the endorsement made at Exh. 24 denotes only consciousness. Even then, the Doctor has deposed in para-4 of his

deposition (Ex.21) that he expressed his opinion regarding the state of the patient as to give a statement, while in fact, this is an opinion regarding the consciousness of the patient. That denotes only that the patient was conscious, but as discussed above, consciousness would not include the mental capacity to make a statement. Therefore, it appears that instead of positively stating the mental state of the patient, PW-5 Dr. Mewada has given an evasive deposition that the patient was in condition as per his endorsement at Exh.24, which again relates only to the consciousness of the patient and not as to mental capacity as deposed by the Doctor earlier. This is the major reason for not placing reliance on the deposition of the Doctor, and ultimately on alleged communication by the deceased to this effect to this witness.

16. Learned APP Mr. Bukhari has further argued that having perused Exh.15 dying declaration, it is clear that the patient has given logical and coherent answers to the queries put to her. Mr. Bukhari has argued that this is sufficient evidence to satisfy the court that the patient was in fit mental condition to make a statement. Mr. Bukhari further argued that having regard to the answers given by the patient vide Exh.15, dying declaration recorded by the Executive Magistrate has expressed her concern about her minor child. This can be done only if the patient is in fit state of mind to make a statement. For this, learned APP Mr. Bukhari has placed reliance on the decision of the Apex Court in the matter of STATE OF RAJASTHAN vs. KISHORE, reported in 1996 (2) JT 595, and also on the decision of this Court in the matter of RAMESHKUMAR MADAJI MARWADI vs. THE STATE OF GUJARAT, reported in 1999(1) GLH 94. In the case of State of Rajasthan vs. Kishore (supra) the Apex Court observed in paras 10, 11 and 19 that settled law by series of judgments is that the dying declaration, if after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there is no legal impediment to form such dying declaration the basis of conviction, even if there is no corroboration. Learned APP Mr. Bukhari has placed reliance on the decision that the dying declaration in this case was relied upon by the Court and a conviction was made. But, having gone through the decision, it is clear that there cannot be any doubt about the proposition of law that a dying declaration can solely form basis for conviction but precondition is that the dying declaration should be true and free from any effort to induce the deceased to make a false statement and if it is coherent and

consistent. In this particular case the Apex Court has relied upon three other corroborative evidence to support the dying declaration. That was also made clear by the Apex court in para-6 that the dying declaration gets corroboration from the FIR, Exh. P.16 and Section 161 statement, Exh.P.19 which consistently spoke of the offence committed by the respondent. Thus, in this case, the dying declaration was relied upon because it inspired confidence to the court because there was other corroborative evidence also to place reliance on the dying declaration. The other decision, which is of this court in the matter of RAMESHKUMAR MADAJI MARWADI vs. STATE OF GUJARAT, reported in 1999(1) GLH 94 relied upon by the learned APP Mr.Bukhari. That was a case wherein deceased communicated as to her death to the Doctor and Doctor in turn deposed the same before the Court. The defense was, such statement, could not be relied upon. The question arose in that case was whether the case papers, which were produced by Doctor in support of his deposition were reliable. As per the Doctor, the patient was conscious when brought to him and upon inquiry gave the history, which was recorded by him in case papers. There was some overwriting in case papers and therefore a doubt was raised on the opinion of the Doctor by the defense but the court disbelieved the defense version that the overwriting anyway affected the case of the prosecution. In these circumstances, the court upheld that dying declaration as reported by the Medical Officer and his disposition were reliable. Placing reliance on this decision, learned APP has vehemently argued that in this case also the reliance may be placed on the deposition of the Doctor and his creditworthiness is unimpeachable.

17. We are unable to accept the contention raised on behalf of the State by learned APP because in the case of R.M. Marwadi (supra) though the mental state of mind of the deceased was not certified but the court was satisfied from the evidence on record that while the deceased gave a statement, she was in fit state of mind because as observed by the Court in paras 12 and 13, the Doctor after having inquired orally from the patient, made notes in case papers in this respect and recorded the history as given by the patient in his own hand writing. After recording of the history, the Doctor recorded that the patient was conscious and he could speak. In view of this medical documentary evidence which was immediately thereafter corroborated by PW4 Constable on duty in the hospital, the court observed that the patient was not only conscious but was also in a fit state of mind. But, in this case, as discussed

above, the witness PW-5 though the medical papers were available with him, neither produced the same nor testified to the satisfaction of the court that what was the mental capacity of the deceased when he recorded the history of the patient. We have sufficiently discussed the evidence of PW-5 above as to why reliance could not be placed upon him. Therefore, the aforesaid decision will not be helpful to appellant - the State.

18. So far as the argument of learned APP Mr. Bukhari regarding the coherent and logical replies given by the deceased in Exh. 15 is concerned, we will have to read Exh.15 and Exh.23 together. In Exh.15 merely because she has expressed her concern about her minor child that itself does not mean that Exh.15 dying declaration was made with competent mental capacity. On the contrary, while we peruse the manner in which the incident has occurred as narrated by the deceased in Exh.15 and in Exh.23, there are major differences between the two statements, which again raises doubt regarding the mental capacity of the patient to have made those two dying declarations. In Exh.15, vide para 6, deceased has stated that she quarreled with her husband at 3.00 a.m. at night. She further stated that her husband lost the money in the gambling and that was the cause of the quarrel. Thereafter, her husband poured kerosene on her and put to her fire by a lamp and her husband ran away. Her whole body was burnt and she was unconscious. She gained consciousness in the hospital where she knew that her Aunt brought her to the hospital for treatment. At that time she stated that she was fully conscious. This is Exh.15 recorded by PW-2 at 8.00 a.m. Earlier to this, statement is given vide Exh.23 as recorded by PW6. She states in Exh. 23 that the day before the incident in the afternoon her husband had taken Rs. 400 from their savings. He returned home at 10.00 p.m. and told the deceased that he had lost money in the gambling. He further demanded money from the deceased. The deceased therefore replied to her husband that she had no money for losing the same in the gambling. This irritated her husband and he started beating the deceased. Without speaking anything the deceased went out of the hut and slept just near the door of the hut. She left her minor child inside the hut. At about 4.00 a.m. in the morning when she was in her deep sleep, she experienced some burning sensation on her feet. She suddenly stood up and looked that her husband was present there. He had a bottle of kerosene in his hand. She started shouting and her whole body was in flames. She was fallen down on the ground. Neighbours on hearing the shout came there. One Kailashbhai and Dammubhai were also came there. Her aunt

also reached to the hut of the deceased and in a rickshaw she was brought to the hospital by her aunt.

19. This is the statement made by her in Exh.23. Now, having considered both the statement at Exhibits 15 and 23 in juxtaposition, it is clear that there are major contradictions in the version narrated by the deceased in both the statements. Even to the extent that in Exh. 23 she states to the extent only that she saw her husband with the bottle of kerosene in his hand while in Exh.15 she says that she was put to fire by her husband by lamp. This is a major reason not to place reliance on this prosecution case which hangs on these two dying declarations because the truthfulness of the statement become doubtful due to the above mentioned two versions which do not get any corroboration from any corner of any evidence adduced by the prosecution and, therefore, the argument advanced on behalf of the State cannot be accepted that having considered the replies given by the deceased vide Exh.15, the mental state of the deceased to be capable of making statement can be inferred.

20. Therefore, in view of the above discussion, Exh.15 and Exh. 23 both dying declarations fail to inspire any confidence regarding the truthfulness of the statement as well as the mental capacity of the deceased to make such statement with 100% burns on the body leaving right feet and lumber region of back. It is also doubtful that the thumb marks obtained on both documents. Though the Doctor PW-5, who treated the patient, was available all the times to certify the mental state of the deceased, has not given any opinion regarding the mental state of the patient. Instead, he has certified the consciousness of the deceased vide Yadi Exh.24 and certified his presence by endorsement below Exh.23 while the same was being recorded. Therefore, deposition of PW5 for the foregoing reasons is not creditworthy. There cannot be any rule of law that merely a witness is independent and uninterested, his version should be believed even if he falls short of creditworthiness in appreciation of judicial scrutiny.

21. For the above stated reasons with all due respect we are unable to agree with the findings recorded by learned Sessions Judge, Surat in Session Case No. 157 of 1989. The conviction of the accused in the above Sessions Case No. 157/89 for the charges under Section 302 of the Indian Penal Code is set aside and the accused appellant is acquitted from the charges under Section 302 of the Indian Penal Code. The appellant be set at

liberty forthwith if he is not required in any other case. Fine if paid be refunded.

(A.K. Trivedi, J.)

(J.R. Vora, J.)

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